Marshall Durbin Poultry Company *and* United Food and Commercial Workers International Union, AFL–CIO. Case 15–CA–11528

September 15, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 31, 1992, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief and a brief in answer to the General Counsel's cross-exceptions. The General Counsel filed an answering brief to the Respondent's exceptions, cross-exceptions and a supporting brief, and a reply brief to the Respondent's answering brief.

On December 23, 1992, the National Labor Relations Board remanded the proceeding to the judge to make further credibility resolutions and to address certain contentions raised by the Respondent in its exceptions.

On February 12, 1993, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions.

The National Labor Relations Board has considered the decision, the supplemental decision, and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Marshall Durbin Poultry Company, Hattiesburg, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees that it is futile for them to select the United Food and Commercial Workers International Union, AFL–CIO or any other labor organization, as their bargaining representative.

WE WILL NOT threaten our employees with plant closure if our employees select the Union, or any other labor organization, as their bargaining representative.

WE WILL NOT interrogate our employees about their activities on behalf of United Food and Commercial Workers International Union, AFL–CIO or any other labor organization.

WE WILL NOT threaten to discharge our employees because they testify in Board proceedings.

WE WILL NOT discharge our employees because they testify in Board proceedings.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Annette Strickland to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges.

WE WILL make Annette Strickland whole for any loss of earnings she suffered by reason of our discrimination against her with interest.

[1] We grant the General Counsel's unopposed motion to correct the transcript.

[2] The General Counsel has excepted to the judge's ruling during the hearing requiring him to provide to the Respondent's counsel the General Counsel's pretrial notes of an interview with one of his witnesses. We find it unnecessary to pass on the propriety of the judge's ruling. Even if erroneous, the General Counsel has failed to show that the ruling was prejudicial to his substantive rights. *Spector Freight System*, 141 NLRB 1110, 1112–1113 (1963).

[3] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The General Counsel requests that the Board issue a broad order against the Respondent because of the serious nature of the violations committed by the Respondent in this case and because the Respondent has demonstrated a proclivity to violate the Act and disregard employee rights, as shown by the recent Board decision in *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993). We find merit in the General Counsel's request and shall provide a broad cease-and-desist order herein.

WE WILL rescind our discharge of Annette Strickland and WE WILL notify her in writing that we will not use her discharge against her in any manner.

MARSHALL DURBIN POULTRY COMPANY

David A. Nixon, Esq., for the General Counsel.
Sidney Lewis, Esq., of New Orleans, Louisiana, for the Respondent.
Jeffrey S. Wheeler, Esq., of College Park, Georgia, for the Charging Party.

DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Hattiesburg, Mississippi, on January 13 and 14, 1992. An amended complaint issued on December 20, 1991. The charge was filed on May 13, 1991, and amended on October 30 and on December 13, 1991.

The complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (4) of the National Labor Relations Act (Act) by comments to its employees and by discharging an employee.

Respondent admitted the commerce allegations of the complaint. It admitted that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admitted that during a representative 12-month period, it purchased and received at its Hattiesburg, Mississippi facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Mississippi. Respondent admitted that at material times, it was a Delaware corporation, with a facility located in Hattiesburg, Mississippi, where it engaged in the processing and nonretail sale of poultry products.

Respondent admitted that the Union is, and has been at material times, a labor organization within the meaning of Section 2(5) of the Act.

I. THE 8(A)(1) ALLEGATIONS

A. *Luke Moody*

1. Threat of discharge

General Counsel alleged that Luke Moody threatened to discharge an employee in late April or early May 1991 because she had testified in an earlier unfair labor practice proceeding.

Annette Strickland testified that there was a conversation on her line including Supervisors Luke Moody and Floyd Washington. In addition to Strickland employees Sharon Holloway and Myrtle Temple were present. Luke Moody told Floyd Washington that there are some people on this line that you need to get rid of and he pointed to Strickland and said, ''[H]er ass especially.''

Record evidence illustrated that Floyd Washington started working for Respondent on May 6, 1991. That was 2 days before Annette Strickland was discharged.

Myrtle Temple testified substantially along the lines of Strickland's testimony regarding the comments by Luke Moody as did Sharon Holloway. Temple testified that after saying to Washington that he had some troublemakers on that line, Moody pointed to Annette Strickland and said you need to watch her and get rid of her.

Sharon Holloway recalled Luke Moody telling Floyd Washington that he had some troublemakers on that line and that Moody pointed to Annette Strickland and said ''especially that one and that we needed to do our best to get rid of her ass.''

Foreman Luke Moody admitted that he trained Foreman Floyd Washington during May 1991 but he denied that he told Washington that Strickland was trouble or that Washington should get rid of her.

The dates when Moody trained Washington was confirmed by Supervisor Jim Sanders who testified from records that Floyd Washington started working for Respondent at Hattiesburg on May 6, 1991.

2. Findings

I do not credit the testimony of Luke Moody. His testimony differed from that of several other witness including some of Respondent's witnesses in this and a prior proceeding. According to Moody the only supervisory person he ever talked to about allegations that he improperly credited Annette Strickland with time she did not work, was the plant manager. That testimony differs from evidence showing that he was confronted first by management regarding Strickland's allegations and then he was included in a meeting in which Strickland and Sharon Holloway were asked to repeat their allegations against Moody in his presence. I was not impressed with Moody's demeanor and I do not credit his testimony.

I do credit the testimony of Strickland, Temple, and Holloway showing that Moody told Floyd Washington to get rid of Strickland. In view of the entire record it is reasonable to conclude that Moody was recommending Strickland's discharge because of her allegations in the prior unfair labor practice proceeding. According to Moody's recollection, he knew nothing about her allegations until he was told that the allegations were made in the unfair labor practice proceedings. I find that his open recommendation in front of three employees constitutes a violation of Section 8(a)(1) in view of the connection between his recommendation and Strickland's testimony involving Moody in the prior unfair labor practice proceedings.

B. *Marshall Durbin*

1. Threat of futility to select the Union

Threat of reprisal

General Counsel alleged that around September 1991, Marshall Durbin threatened employees with reprisals; that Respondent would never negotiate or deal with the Union; and that it would be futile for them to select the Union.

Myrtle Temple testified that she attended a speech by Marshall Durbin in September 1991:

> He started out by telling the employees that he was Marshall Durbin, Jr., and that he was there because they had a little problem about the union trying to come in, and he got to talking. And he told that he had a place in his heart for each and every one of his employees in the Hattiesburg plant.

> He talked a good bit about Tupelo and how the union had come in up there and how bad it was for the employees and everything, and finally they got the union out. He said that he would not allow the union to come in to his Hattiesburg plant, because it was bad, and it was the same union that was in Tupelo that was trying to come into the Hattiesburg plant.
>
> He said that if the union did come in, he would not go to the bargain table and bargain with anything that the union had a say-so with, and then he said that he didn't think that the union would even let us have an election, and that they would turn their backs on us and walk off, and then the union supporters would be fired.

Michele Pittman who works for Respondent in packing and stuffing, testified that she attended one of the speeches given by Marshall Durbin. Pittman recalled that Durbin said he was 100 percent against the Union and he would not bargain with them. According to Pittman, Durbin was speaking soft and low but she testified that she could hear the above comment.

Gladys Johnson, a stuffer for Respondent, testified that she was at one of Durbin's speeches. Johnson said that Durbin spoke low and his voice was shaky and she could bearly hear him. Johnson said that she heard Durbin say that if the Union came into the Company, he would not sit down and bargain with them at the bargaining table if he didn't want to.

Sharon Holloway attended a speech by Marshall Durbin in September 1991. She recalled that he told the employees that they were not going to negotiate at all with the Union and before he would let the Union in he would shut it down.

Mary Jones who works for Respondent on a cut-up line, testified that she attended a meeting conducted by Marshall Durbin in the plant during September 1991. She testified that she heard Durbin say that before he would allow a union in the Hattiesburg plant he would shut it down.

On cross-examination Mary Jones testified that Durbin appeared to be reading his talk but he did not appear to be reading when he made the comment noted above that he would shut it down.

Mary Ann Fairley testified that she attended one of Marshall Durbin's speeches and she recalled that he said that before he let the Union come in he would shut it down.

Marshall Durbin Jr., Respondent's president, testified that he gave two talks to groups of employees on September 17, 1991. He testified that he read verbatim from a text. The text was received in evidence. He denied that he threatened employees with reprisals in response to their support of the Union; that he told the employees that he would never deal with the Union and, according to his testimony, he told the employees they would negotiate in good faith if the Union was selected. Durbin denied that he told the employees that it would be futile for them to select the Union.

Respondent's vice president, Scott Varner, and Director of Human Resources and Planning Fincher Allen testified they were familiar with the written text prepared for Durbin's speech and that Durbin read the speech verbatim.

Jim Sanders testified that he attended Durbin's speech and that Durbin followed the text.

2. Findings

I am convinced that the employees that testified about Durbin's speech were truthfully telling what they thought Durbin had said. The text of the speech shows that Durbin came close to saying the things recalled by the witnesses. However, in view of the testimony from Durbin, Varner, Allen, and Sanders, that Durbin followed the text of the speech, I am convinced that is correct. The room was noisy and it was undoubtedly difficult to hear and concentrate on Durbin's speech. The testimony of General Counsel's witnesses illustrates the difficulty of understanding the speech and their testimony shows by the fact that few recall Durbin making similar statements, the unlikelihood that Durbin actually departed from the text. Therefore, as to this issue I credit Respondent's witnesses. I find from an examination of the credited evidence which includes the text of the speech, that Respondent did not violate Section 8(a)(1) in this regard.

C. *Scott Varner*

1. Threat of futility to select the Union

General Counsel alleged that around October 1991 Scott Varner threatened employees that it would be futile for them to select the Union.

In October 1991, Mary Jones, a cut-up line employee, went into Scott Varner's office to get a copy of the Tupelo, Mississippi Durbin plant's collective-bargaining contract. Fincher Allen was also in the office with Scott Varner. According to Jones, Varner told her that Marshall Durbin does not have to give the employees anything.

> Okay. (Scott Varner) was telling me that he wanted me to have the facts, that Marshall Durbin—he said something about a five-cent raise every five years and a ten-cent raise for people that had been there ten years or something like that. He said that Marshall Durbin does not have to give us any—he doesn't have to give us anything; he doesn't owe us anything, and he does that to show the employees that he appreciates them, and he recognizes the—you know, that they have been there that long.
>
> (Varner) said that Marshall Durbin does not have to sit down at the bargaining table with no union representative and agree with anything. . . .
>
> (Varner) said how the union had made a mess of things in Tupelo and the one in Alabama, and that is why they are closed.

Sharon Holloway testified that she attended a meeting conducted by Scott Varner in October 1991 and that along with some employees, Neil Keith and Charles Kendrick were present. Holloway testified that Varner was telling them of the bad points of unions and Varner told them ''that Marshall Durbin was a man of his word, and if he say he will shut the plant down before he would let the union in, he would shut it down.''

Carolyn Bradley attended one of Scott Varner's meetings in October 1991. Bradley also identified Charles Kendrick, Neil Keith, and Fincher Allen as being present. She recalled that one of the men, she did not recall which one, said he had been knowing Marshall Durbin for a long time, and if

he says he will close it down before he lets the Union in, he will.

Vice President Scott Varner admitted that he did hold meetings with employees during October 1991 regarding the upcoming union election. Varner denied that he told anyone that Respondent would shut down the plant if the Union came in. In fact, according to Varner, that question was occasionally asked by employees and he told those employees they were going to operate the plant regardless of the election outcome. Varner testified that he told the employees that if the Union came in Respondent would sit down in good faith and bargain with the Union.

Director of Human Resources and Planning Fincher Allen testified that he was present during about 90 percent of Varner's meetings with employees and that Varner never told employees that he would not bargain with the Union and Varner never told employees that the plant would close if the Union came in.

2. Findings

I was impressed with the demeanor of Mary Jones and Sharon Holloway and I credit their testimony. Unlike the situation involving the speeches of Marshall Durbin, Scott Varner did not meet with a large group of employees nor did he read from a text. Varner met with small groups of employees. I was impressed with the recollection of Jones and Holloway. Here, the employees were in a situation where it was necessary to pay more attention to the comments of the supervisor than was the case with Durbin's speeches. Jones and Holloway were required to converse with Varner.

The credited testimony of Jones and Holloway proves that Varner stressed to them that it would be futile to select the Union since Durbin would not bargain and he also indicated to both that the Hattiesburg plant would close before Durbin would let the Union in. I find that Varner's comments constitute violations of Section 8(a)(1) of the Act. *Southern Illinois Petrol*, 277 NLRB 160, 170 (1985); *Hilty Tank Corp.*, 273 NLRB 979, 988 (1984).

D. *Interrogation*

1. Jim Sanders

General Counsel alleged that on October 2, 1991, Jim Sanders illegally interrogated Respondent's employees about their union activities.

On October 2, 1991, Mary Jones was called into Jim Sanders' office. Also there was Supervisor Ken Barber. Jones asked why she had been called in and Sanders told her that they just wanted to talk about what she wanted to talk about. She asked what was everyone than had been called in talking about. Sanders replied insurance, benefits, things like that. Mary Jones then said but you all want to talk about the Union. Sanders replied yes. The conversation continued:

> I said, what do you want to know. He said, well, Jim Sanders said if the union were to go on strike, would you walk the picket line with them? I said, yes, I did.
>
> He said, well, who is going to pay your bills? Who is going to feed your family? Who is going to pay your car note? I said, well, the union will. He said, that is a lie. He said, the union cannot do that. He said, If the union—he said, I am looking out for your best interests. He said, If the union could guarantee you $8 an hour, I would say, go for it, because I am looking out for your best interests. But he said, but there is no way that they can do that.

Jim Sanders admitted discussing the Union with Mary Jones but he denied asking her if she would walk a picket line.

2. Findings

As I indicated above Mary Jones presented a good demeanor. She admitted that she did not recall much of Marshall Durbin's speech. However, she testified in detail about her meeting in Sanders' office. She testified on cross that Sanders told her that regardless of which way she voted it would not affect his job in any way.

I credit Jones' testimony and do not credit the testimony of Jim Sanders. Sanders demonstrated that his recollection of significant events was not good. For example Sanders was unable to recall the details of his being given the responsibility of maintaining the absentee records of his employees around January 1991. Sanders appeared evasive on cross. I was not impressed with his demeanor.

The credited testimony of Jones proves that Sanders interrogated her about matters which revealed not only her preference for the Union but the extent to which she would go in support of the Union.

Jones was not shown to have been a known union advocate. I find that Respondent violated Section 8(a)(1) of the Act. *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *WXON-TV*, 289 NLRB 615, 619 (1988); *Heck's Inc*., 277 NLRB 916, 922 (1985); *Southern Illinois Petrol*, 277 NLRB 160, 170 (1988); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

II. THE 8(A)(4) ALLEGATIONS

A. *The Discharge of Annette Strickland*

General Counsel alleged that Respondent discharged Annette Strickland on May 8, 1991, because she had testified in an earlier unfair labor practice proceeding.

Respondent admitted that it discharged Annette Strickland on May 8, 1991.

In a previously held unfair labor practice hearing General Counsel called some 13 nonsupervisory employees of Respondent, as witnesses in his case including Annette Strickland. Annette Strickland was called as a witness on April 25, 1991, in Cases 15–CA–11268 and 15–CA–11372–2.

The parties stipulated that Annette Strickland and another witness for General Counsel, Sharon Holloway, were both called to testify about essentially the same matters.

Annette Strickland testified that she was employed by Respondent on the CVP line from January 1990 until her discharge on May 8, 1991.

As shown above, Strickland testified that there was a conversation on her line including Supervisors Luke Moody and Floyd Washington. In addition to Strickland employees Sharon Holloway and Myrtle Temple were present. Luke Moody told Floyd Washington, who was being trained to take over as foreman, that there are some people on this line that you

need to get rid of and he pointed to Strickland and said, ''[H]er ass especially.'' As shown above, both Myrtle Temple and Sharon Holloway testified in accord with Strickland and I credited their testimony and discredited the denial of Luke Moody.

Jim Sanders testified from records that Floyd Washington was hired on May 6, 1991. Luke Moody admitted that he trained Washington to become foreman over the line Annette Strickland worked on.

Jim Sanders, Respondent's packing and shipping supervisor, testified that he made the decision to terminate Annette Strickland.

Strickland was discharged on May 8, within 2 days after Foreman Luke Moody told new Foreman Floyd Washington, to get rid of Strickland, and within a few days after Strickland testified against Respondent on April 25, 1991.

Sanders testified that it is Respondent's practice to automatically terminate any employee that receives 11 absence occurrences during a 12-month period. The 12 months are measured back from the last occurrence. In determining occurrences, consecutive absences count as one occurrence, as does a single absence standing alone. Being late for work counts as one-third of an occurrence unless the employee was over half the shift late, in which case it would count as an absence. There was no grace period for tardy. One minute late counted as being late.

Sanders admitted that he was cross-examined during a previous unfair labor practice hearing around April 1991, about a complaint from employees Annette Strickland and Sharon Holloway, that Supervisor Moody had credited Strickland with time that she had not worked because he was seeking sexual favors from Strickland.

Sanders testified that he talked with Annette Strickland on the phone on the day of her discharge. Strickland told him that her car had been stolen and she asked Sanders if she could get a vacation day. Sanders told her no, that vacations had to be scheduled but that if she came in before 11:20, it would only count a third or if she came in after 11:20 it will count as an absence. Sanders also recalled something was said about another absence would terminate her and he believed that was said by him. Sanders said that he may have checked Strickland's record while she was on the phone.

Annette Strickland testified regarding her call to Sanders on the morning of May 8. Her account of the conversation was similar to Sanders' account. Strickland testified that after talking with Sanders she phoned the police and subsequently discovered her car had been repossessed rather than being stolen. She phoned her husband and she and her husband went to the bank and were successful in getting enough funds to retrieve her car. Immediately upon getting her car back Strickland drove to the plant but it was about 2:30 p.m.

The parties stipulated that Annette Strickland did have vacation time available when she made the request of Sanders on May 8.

As admitted by her, Strickland did not report for work before 11:20 on May 8. She did not arrive until after 2 p.m. When she arrived she met with Sanders in personnel. Sanders testified that Annette Strickland asked if she was fired. Sanders repeated what he had told her on the phone that she would have been charged one third point if she had arrived before 11:20 but that since she did not arrive for work until after that time, she was being charged for a full absence. Sanders ''got down the books.'' Then told Strickland ''that she was over on days, and—let's see—and that she was terminated.''

Annette Strickland testified that after Sanders told her that she was terminated she told him that she had not missed 10-2/3 days as the record showed. She argued that even if it did show those missed days she should have one coming off in April and one coming off in May. Sanders replied, ''Well, we don't have to get into all of that. I said you are dismissed, so he got up and told Kathy to give a check and he told Tom to go and get my other check for Monday and Tuesday . . . .''

Respondent contends that the policy regarding granting immediate vacation time was changed in September 1991 but that before that time their policy was not to grant vacation time pursuant to an immediate request. Respondent's counsel stated, however, there was nothing in writing regarding the change in policy.

Respondent's personnel manager, Charles Kendrick testified that the policy at the Hattiesburg plant during the period May to September 1991 was to deny vacation request unless the vacation had been previously scheduled. Request for immediate emergency vacation time was denied in accord with that policy. According to Kendrick and Scott Varner, however, that policy was changed by Vice President Scott Varner during September 1991 when, in response to questions from employees during meetings about the upcoming election, Varner told the employees there was no reason why they should be denied vacation time for emergencies. Kendrick testified that the policy was not contained in writing and was not included in the policy manual.

Foremen Glendell Hilton Lee and Tom Thorla testified that before September 1991 the policy was to not grant vacation under immediate emergency conditions. In September Lee heard from employees that they had been told in a meeting that the policy was to permit immediate vacation in an emergency. She checked with Jim Sanders and was told that the policy had changed. Lee testified that before that time her employees did not request immediate vacation in emergencies, but afterward she had several such requests which she granted.

Tom Thorla testified that for some time before Jim Sanders came to Hattiesburg, the policy was to grant immediate emergency vacation but that later the policy was changed to one of not permitting vacations unless the vacations had been scheduled in advance.

The parties stipulated there is nothing in writing regarding the policy of considering vacation request for vacation on the day of the request.

General Counsel offered evidence regarding the policy regarding request for immediate vacation time both before and after September 1991.

Myrtle Temple testified that she had a conversation with Jim Sanders about June 25, 1990. Temple asked Sanders why he did not answer her phone page that morning because she had unsuccessfully tried to phone him three times. Sanders told her he did not hear but what was the problem. Temple told Sanders that she wanted a vacation day off because she wanted to go to a funeral with her daughter but that since she had come to work she would like to take off at lunch. Sanders told her that she had plenty of vacation days left and he gave her permission to take the day off and be with her

daughter. Temple testified that before that occasion she had several occasions when she had to phone in and ask for the day off due to her daughter being sick. Temple testified that she was always given the day off on those occasions.

On cross-examination Temple testified that Respondent's funeral policy applied to family members and the funeral involved in her request to Jim Sanders was a friend of her daughter. She recalled that she was charged with vacation time on that occasion and that Jim Sanders had written vacation for that day on her timecard.

Jim Sanders testified that he would have noted any exceptions to the immediate vacation prohibition and he noted only one such case and that involved Annette Fairley. That occasion is discussed below. Sanders did not recall the incident recalled by Myrtle Temple.

In accord with my findings above, I found Myrtle Temple to be a credible witness. She demonstrated good recall for events during both direct and cross-examination. I credit her testimony and discredit the testimony of Jim Sanders which conflicted with Myrtle Temple. Sanders was evasive on cross and demonstrated a poor recall of such important issues as how he came to take over the absentee records for his employees during January 1991.

Flora Jean McGilvery, a packer with Respondent, testified that she attended a meeting of employees, Personnel Manager Charles Kendrick, Neil Keith, and Fincher Allen, at the plant shortly after lunch in September or October 1991. During that meeting employee Valecia Twilley asked if the employees were allowed to take vacation time in case of emergency. Neil Keith replied that the vacation days are ''yours to take. You know, if you wake up and something come up, like an emergency or something, you can call in and ask for a vacation day.''

Shortly after that meeting, McGilvery had a conversation with Jim Sanders at work on her line. McGilvery told Sanders that she did not realize that you can call in and take a vacation day in case of emergency. Sanders replied, ''yes, that was part of policy, you know; you ask to speak to me and I will give you that day off, you know, if an emergency was to come up as your child—or something come up that can't be prevented.''

Rena McCuller, an employee on the CVP line, testified that she phoned her Supervisor Ken Barber on two occasions, in late November and in December 1991, and asked for emergency leave on each of those days and her requests were granted.

On cross-examination McCuller was asked if she had ever called before November 1991 and asked for immediate emergency leave. McCuller answered that she had but she did not recall the date and she testified that she was not aware of any change in the policy of emergency leave during September or October 1991.

Mary Ann Fairley, an employee classified as poultry bagging, testified that she asked and received emergency leave on four occasions during November 1991 from her Supervisor Ken Barber. Fairley was not aware of a change in policy regarding emergency vacation. November 1991 was the first occasion she had to ask for immediate vacation time.

Carolyn Bradley testified that she has worked for two years on the CVP line. She first had occasion to ask for immediate vacation time on a day in May 1991. She called and talked with her Foreman Floyd Washington before starting time and was granted her request to be off that day on vacation. Subsequently Bradley had another occasion in September 1991 to ask for an immediate vacation day. On that occasion she asked Ken Barber. Again her request was granted.

Michael Haines Bennett testified that he has worked for Respondent for 4 years. In the summer of 1989 Bennett phoned his foreman, Billy Johnson, before his shift and asked for a vacation day off because his brother had been stabbed. Johnson granted Bennett's request.

Billy Johnson who worked for Respondent from 1980 until 1990 testified that while he was a foreman in 1989 he asked the plant manager about the policy regarding granting vacation time following a request for immediate time off. The plant manager told him the policy was to take care of the good employees and grant vacation days when the employee called in. That plant manager, Malcolm McDonald, has remained plant manager through all material times.

Johnson testified that after that conversation he had numerous occasions in which he granted vacation time immediately upon an employee phoning in for emergency leave. Johnson testified that on one occasion employee Myrtle Temple phoned in and asked for immediate leave and he granted her request. He then told his Supervisor Jim Sanders and Sanders told him that was fine, no problem.

Johnson testified that on every occasion since 1987 when one of the employees he supervised, asked for immediate vacation time, he granted the request.

I credit the testimony of Flora Jean McGilvery, Rena McCuller, Mary Ann Fairley, Carolyn Bradley, Michael Haines, Bennett, and Billy Johnson. All presented good demeanor and their testimony was almost entirely unrebutted.

B. *Findings*

Much of the evidence regarding the allegation that Annette Strickland was discriminatorily discharged, was not contested. Neither Strickland nor Sanders appeared credible in many regards. However, I credit their testimony which was in substantial agreement, regarding the events of May 8.

In consideration of whether an employee has been discriminatorily discharged in violation of Section 8(a)(4) the test is that which is oftentimes applied in alleged violation of Section 8(a)(3) of the Act. I must first consider whether General Counsel proved a prima facie case. Then if I find that he has, I must consider whether Respondent has proved that the employee would have been discharged in the absence of protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986). See also *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992), for a discussion of the three tests required by *Wright Line*.

In the instant case in consideration of whether General Counsel proved a prima facie case the evidence proved that Respondent strongly opposed its employees' union activities. The evidence also illustrated that Annette Strickland testified in unfair labor practice proceedings on behalf of General Counsel and in opposition to Respondent, on April 25, 1991. Subsequently on either May 6 when Floyd Washington started working for Respondent, or on May 7, the last day An-

nette Strickland worked, Foreman Luke Moody told Washington that Strickland was a troublemaker and that Washington should get rid of her. On May 8, Strickland was discharged.

The record shows evidence of disparity. On several occasions both before and after May 8, employees were permitted vacation time off, immediately following requests under emergency conditions on the day they made the request for vacation.

Respondent did not show that a particular employee, other than Strickland, was ever told they could not take immediate vacation under emergency conditions and no employee was ever disciplined under the absentee policy after requesting immediate vacation under emergency conditions. Jim Sanders admitted that on one occasion he did grant immediate vacation time to employee Annette Fairley. On July 1, 1991, Annette Fairley phoned and asked for vacation that day. Fairley had been involved in an auto accident in which she struck and killed a pedestrian. Jim Sanders testified that Annette Fairley also testified for General Counsel in the prior proceeding. Additionally, as shown above, I credit evidence showing that Sanders and other supervisors in his department granted requests for immediate vacation time.

In view of the full record, especially the matters noted above, I find that General Counsel proved a prima facie case of discriminatory discharge of Annette Strickland.

Respondent in arguing that Annette Strickland would have been discharged in the absence of her protected activities, contended that she was discharged in strict accord with its absentee policy.

As to Respondent's position, there appears to be only one area of dispute. Respondent contends, and General Counsel disputes, that it was the policy for those employees that worked under the supervision of Jim Sanders during the period from January to September 1991, to not grant vacation requests made on the day the employee wanted off.

As shown above, General Counsel offered evidence that employees were granted immediate vacations on the day of their requests both before and after May 8, 1991.

In support of its position Respondent pointed out that Supervisors did not receive many requests for immediate vacation time until after the policy of granting immediate vacation was announced in September 1991 and that employees expressed surprise by asking and being told that they could receive immediate vacation time for emergencies during meetings in September and October 1991.

There was some support in the record as Respondent contends. However, there was no direct evidence that Respondent ever changed its policy to one of never granting requests for immediate vacation time. Jim Sanders testified on three occasions and he never did testify how he instituted a new policy of never granting requests for immediate vacation time.

On cross-examination Sanders was asked for details on how he came to assume responsibility for the absentee records for his employees around January 1991. Sanders was unable to recall the details of how he assumed that responsibility.

Sanders was not asked nor did he testify, as to if, when or how he instituted a policy of automatically denying requests for vacation time on the day of the request. The record contains no direct evidence that policy was changed by Sanders or anyone else.

Instead, as mentioned above, Respondent pointed to some indirect evidence which allegedly shows the policy during May 1991 was one of not granting immediate requests for vacations. Employees did ask and were told during September and October 1991 that they could receive emergency vacation time on the day of their request. Afterward, according to Jim Sanders, there was an immediate increase in the number of requests for immediate vacation time.

I find that evidence that employees may not have always asked for immediate vacation time before September, does not establish that Respondent had a policy of not granting immediate requests.

I make that finding in view of the fact that the evidence shows that employees were granted immediate vacation time during the period of the alleged no vacation policy.

There was one document in which some reference is made to the no immediate vacation policy in addition to the documents regarding Annette Strickland's discharge. In a document dated July 3, 1991, Jim Sanders refers to that policy as well as mentioning that Annette Fairley told him that she knew that she was not supposed to call in and ask for vacation on the spur of the moment.

However, the incident involving Annette Fairley occurred after Annette Strickland was fired and after an unfair labor practice charge had been filed over her discharge. Obviously, that information could have caused Annette Fairley to think that she was not allowed to receive vacation time on a spur of the moment request and it may have influenced Sanders to try and document a questionable policy.

A similar consideration may be applied to why employees may have been surprised to learn in September and October 1991 that they could receive emergency vacation time. In May 1991, Annette Strickland had been fired after asking for but not being given, a days vacation because her car had been taken. Obviously that event would logically led employees to believe that Jim Sanders would not grant vacation time for an emergency.

Therefore, I find that the record evidence failed to prove that Jim Sanders' had an established policy of denying requests for emergency vacation time on May 8 when he fired Annette Strickland.

Additionally, Respondent argued that other employees testified in the earlier proceedings and that one of those employees, Sharon Holloway, actually testified about the same matter testified to by Annette Strickland, and another, Annette Fairley was granted an exception to the no immediate vacation rule, but that Respondent did not discharge those employees. Respondent contended that illustrated that it did not fire Strickland because of her testimony in view of the fact that it did not fire any of the other employees that testified.

In response to that the record illustrated that only Strickland was vulnerable to discharge under the absentee rule. The record did not show that any of those other employees were vulnerable to discharge. None was shown to be at the point where one additional absence would establish grounds for discharge.

I find that Respondent denied Strickland's request for an emergency vacation and used that denial as a pretext in justification of her discharge. See also *Northport Health Serv-*

ices v. NLRB, supra; *Shattuck Dunn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Clark & Wilkins Industries*, 290 NLRB 106, 107 (1988).

CONCLUSIONS OF LAW

1. Marshall Durbin Poultry Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by threatening its employees with discharge because they testified in an NLRB hearing; by threatening its employees that it is futile for them to select the Union as their bargaining representative; by threatening its employees with plant closure if they select the Union; and by interrogating its employees about their union activities has engaged in conduct violative of Section 8(a)(1) of the Act.

4. Respondent by discharging and refusing to rehire its employee Annette Strickland because she gave testimony in an NLRB unfair labor practice proceeding, engaged in conduct violative of Section 8(a)(1) and (4) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally discharged its employee in violation of sections of the Act, I shall order Respondent to offer Annette Strickland immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. I further order Respondent to make Strickland whole for any loss of earnings she suffered as a result of the discrimination against her and that Respondent remove from its records any reference to the unlawful actions against its employee Strickland and notify Strickland in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

David A. Nixon, Esq., for the General Counsel.
Sidney Lewis, Esq., of New Orleans, Louisiana, for the Respondent.
Jeffrey S. Wheeler, Esq., of College Park, Georgia, for the Charging Party.

SUPPLEMENTAL DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. On December 23, 1992, the National Labor Relations Board (Board) issued an order remanding the decision in this matter (JD(ATL)–27–92) for consideration of issues set out in its order. Subsequently I set the deadline for receipt of briefs from the parties on the issues raised in the Board's remand.

The Board in its order remanding this matter, raised questions regarding the finding in the decision that employee Annette Strickland was discharged in violation of Section 8(a)(1) and (4) of the National Labor Relations Act (Act).

In that regard the Board questioned whether the finding that Annette Strickland was treated disparately was supported by substantial evidence. Specifically the Board questioned whether substantial evidence supported the finding that Supervisor Jim Sanders acted in a disparate manner by refusing to grant Strickland immediate vacation time pursuant to her request on May 8, 1991.

Strickland was discharged on May 8, 1991, allegedly under Respondent's absentee policy. The policy, which is not in dispute, called for the discharge of any employee that received 11 or more absentee occurrences. Annette Strickland had 10-1/3 occurrences on her record on May 8 when she phoned Respondent and requested emergency vacation that day because her car had been stolen. Supervisor Jim Sanders denied her request for emergency vacation and it is that action by Sanders which is called into issue and which is of concern to the Board as expressed in its remand.

Respondent contended that Supervisor Jim Sanders enforced a policy of denying employees requests to take a vacation day on the same day a request was made, from January to September 1991. The Board pointed out in its order that that policy was supported by testimony of Supervisor Jim Sanders, Personnel Manager Charles Kendrick, and Foremen Glendell Lee and Tom Thorla.

In consideration of the Board's Order, the record evidence and briefs originally filed as well as briefs filed in regard to issues raised in the remand, by Respondent and General Counsel, I issue this supplemental decision setting forth the resolution of credibility issues, findings of fact, conclusions of law, and a recommended Order.

In consideration of the alleged illegal discharge of Annette Strickland, I first considered whether General Counsel proved prima facie that one of the reasons for the discharge was protected activity. If I found in support of General Counsel then I was required to consider whether Respondent proved that it would have discharged Strickland in the absence of her protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

In my decision I found that General Counsel proved a prima facie case on finding that Respondent strongly opposed its employees' union activities; that Annette Strickland was discharged on May 8, which was a few days after she testified in Board proceedings against Respondent on April 25[1] and 1 or 2 days after Foreman Luke Moody told Foreman Floyd Washington that Strickland was a troublemaker and that Washington should get rid of her; and on evidence showing disparity in its treatment of Strickland as opposed to its normal practice.

In its remand, the Board, in agreement with Respondent, stated:

[1] See *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993).

> We agree with the Respondent's statement in its exceptions that the judge, in finding that no policy existed of denying same day requests for vacations, failed to address the evidence of witnesses who testified, without contradiction, that there was such a policy. Because the judge failed to credit or discredit this testimony, we cannot determine whether the record supports his finding that the Respondent discriminatorily discharged Strickland.

As pointed out by the Board, four of Respondent's witnesses testified that it was Respondent's policy to deny same day requests for vacation time.

Foreman Glendell Hilton Lee, an admitted supervisor that worked under the supervision of Jim Sanders, was asked by Respondent's counsel what was the policy during the January to September 1991 period, regarding requests for same day vacations and Lee answered that the policy was to deny those requests.

Foreman Tom Thorla, an admitted supervisor that worked under the supervision of Jim Sanders, testified that Respondent's policy since 1987 was to deny requests for same day vacation time.

Personnel Manager Charles Kendrick testified that from the time he was first employed by Respondent in May until September 1991, it was Respondent's policy to deny same day requests for vacation time.

Supervisor Jim Sanders testified that Respondent's policy since he was employed in 1989 was to deny same day requests for vacation time.

In consideration of whether the above testimony is credible it is important to restate the issue. Respondent argued that Supervisor Jim Sanders enforced a policy of denying immediate vacation time from January to September 1991 and that the policy that Sanders enforced was unique to the area supervised by Sanders.

By limiting the time of enforcement to the January to September 1991 period and by limiting the area of enforcement to the employees under the supervision of Sanders, Respondent placed several restrictions on General Counsel. For example, Respondent argued that evidence of disparity must be limited to the January to September period. If that argument is adopted, for example, the testimony of former Foreman Billy Johnson as to disparity would be irrelevant because Johnson was discharged before the alleged applicable period. Moreover, if the policy was limited to Sanders' supervision, then evidence of Respondent's policy was not relevant.

Unfortunately from Respondent's position, there is absolutely no evidence in the record to support its argument.

Even Supervisor Jim Sanders did not testify in support of that argument. He testified that Respondent's policy since he was employed in 1989 was to deny same day requests for vacation time. Additionally, Foreman Tom Thorla, who worked under the supervision of Sanders testified that it was Respondent's policy to deny same day requests for vacation time since 1987 when he was told of that policy by his supervisor at that time. Foreman Glendell Lee also failed to support Respondent's argument. Lee was asked what was the policy from January to September 1991 and she responded that the policy during that time was to deny same day requests for vacation time. Lee was not asked if there was a change in policy in January 1991.

Finally, Personnel Manager Kendrick was limited in his testimony to the time he was employed by Respondent. Moreover, according to Kendrick it was Respondent's policy, not solely that of Supervisor Sanders, to deny same day requests for vacation time from the time of his employment in May until September 1991.

As to the question of was the no immediate vacation policy peculiar to the employees supervised by Jim Sanders, that argument along with the argument that Sanders started the policy in January 1991, was not supported by any evidence in the record. Both Jim Sanders and Tom Thorla testified to the contrary. According to Sanders he understood Respondent's policy since he was employed in 1989 to require denial of requests for immediate vacations. Sanders testified that he is the first one that gets to the plant in the packing department each morning and that he has received some phone calls requesting immediate vacation. Sanders testified that since 1989 he has uniformly denied those requests with the exception of one made by Annette Fairley after she had an auto accident on the way to work in July 1991. Sanders did not name any specific employees that were denied immediate vacation time.

The only matter claimed by Sanders to have occurred in January 1991 was his taking over the responsibility of maintaining the absentee records and handling such things as disciplinary actions under the absentee policy for employees under his supervision. He made no claim that he changed policy when he assumed those additional duties.

I find that the record does not support Respondent's contention that Jim Sanders enforced a unique policy in his area of responsibility in Respondent's Hattiesburg facility, of denying same day requests for vacation time from January to September 1991.

There remains a question as to whether Respondent or Sanders had a policy in place before January 1991 of refusing to grant same day vacation requests.

I do agree with Respondent that its employees were told in September 1991 that its policy was to allow same day requests for emergency vacation time. That point is not disputed. There is a dispute as to whether that announcement which was made in a series of employee meetings, represented a change in policy for the Hattiesburg facility. Clearly, it did represent a change from the practice applied to Annette Strickland.

Due to that factor which was specifically discussed by the Board in its remand order, I do not rely on testimony that Respondent granted requests for same day emergency vacation time where the requests were made after the September 1991 employee meetings.

I now find that the credited evidence in the record proved that it was not Respondent's practice during May 1991 when Annette Strickland was discharged, to deny same day requests for emergency vacation time. I specifically discredit the testimony of Glendell Hilton Lee, Tom Thorla, Charles Kendrick, and Jim Sanders to the extend their testimony shows that Respondent's policy on May 8 was to deny same day requests for vacation time.

Annette Strickland's May 8 request was for emergency vacation. Lee, Thorla, Kendrick, and Sanders testified about the general practice regarding immediate vacation requests as opposed to requests for immediate vacation due to an emergency.

Lee, Thorla, Kendrick, and Sanders testified as to different times when the alleged practice of denying immediate vacation time was in place and there was no evidence showing when Respondent implemented that policy.

Moreover, standing against the above was unrebutted testimony from a former foreman, Billy Johnson,[2] that Plant Manager Malcolm McDonald told him in 1989 that it was Respondent's policy when faced with a request for immediate time off to take care of the good employees and grant vacation days when the employee called in. During all material times Plant Manager McDonald was the person in authority over all the supervisors at Respondent's Hattiesburg facility. I credit Johnson's testimony in that regard on the basis of my observation of his demeanor and in view of the fact that Plant Manager McDonald did not contest Johnson's testimony. Johnson's testimony as to that occasion was as follows:

> I asked Mr. McDonald what was the company's policy concerning giving people vacation days upon the date that they called in. Malcolm (McDonald) said that it was the company's policy that they would—we would take care of the good employees, and people who were becoming in peril with their absenteeism would be put on vacation days when they called in.

The record contained no evidence that employees were ever told of the implementation of a policy of refusing to grant same day vacation requests. Moreover, the parties stipulated that there was no writing before May 1991, in Respondent's records, setting out the alleged policy of denying same day requests for vacations.

Respondent in its remand brief agreed there was no evidence as to specific occurrences of an employee being denied a same day requests for vacation time. Respondent argued it would have been like producing the proverbial needle in the haystack to produce such evidence.

In fact Respondent called four supervisors. Obviously those supervisors were in as good a position as any employee or former employee under their respective supervision, that had been denied a same day request for vacation time, but none of those supervisors testified as to a specific incident of denying a same day request other than the incident involving Strickland.

In addition to the fact that there was no evidence of or when the alleged policy was first implemented, there was unrebutted testimony that Respondent's plant manager at Hattiesburg told a supervisor in 1989 that Respondent's policy was to grant immediate vacations for their good employees when the employee was ''in peril,'' and Respondent's vice president Scott Varner expressed surprise when Hattiesburg employees asked him about their entitlement to emergency vacation time during employee meetings over the union campaign in September 1991. Varner knew the policy in Respondent's other plants was to grant immediate emergency vacation and he thought that was the policy at Hattiesburg. He told the employees they could take immediate vacation time in an emergency.

Additionally, I credited the testimony of Myrtle Temple that Jim Sanders granted her vacation time on the day of her request after she explained to him that she wanted to take her daughter to the funeral of her daughter's friend. In the original decision I discredited the testimony of Jim Sanders that he did not recall that incident which occurred around June 25, 1990.

I also credited the unrebutted testimony of Carolyn Bradley that she was granted a same day request for vacation time in May 1991 by her foreman, Floyd Washington. Washington worked under the supervision of Jim Sanders. Washington was the foreman of Annette Strickland at the time of her discharge on May 8, 1991.

Respondent argued that there was no evidence showing that Jim Sanders knew of Carolyn Bradley's receipt of same day vacation time in May 1991. However, Sanders admittedly reviewed the absentee calendars for all his employees at that time and he would have seen that Bradley was absent for 1 day and she had been granted a vacation on that one day. If he was monitoring the records as he testified, he would have been aware that the records did not show a prior request for vacation time submitted by Bradley. Moreover, Floyd Washington, the foreman that granted the vacation time, worked under the direct supervision of Sanders and Bradley's testimony illustrates that Washington had not been informed of the alleged policy by Sanders.

I find that the credited evidence failed to show that it was Respondent's policy from January until September 1991, to deny same day requests for emergency vacation time. I credit testimony, as noted above, that it was Respondent's policy to ''take care of the good employees, and people who were becoming in peril with their absenteeism,'' by granting vacation time on the day the employee called in. At the time of her discharge Annette Strickland was in peril with her absenteeism. She was previously charged with 10-1/3 occurrences and 1 additional absence would subject her to discharge. There was no showing of how Respondent determined which employees were ''good employees,'' nor was there proof that Strickland was not a ''good employee.'' In fact Supervisor Sanders was asked if Strickland was an acceptable employee in all respects except attendance and he responded yes.

Respondent argued that the fact that employees asked and were surprised to learn during September employee meetings, that they could receive same day requested vacation time under emergency conditions, shows that the policy before then was to deny such requests.

As mentioned above, Vice President Scott Varner testified that in meetings he conducted in September, several employees asked him if employees could take a day's vacation in an emergency. Varner admittedly answered that he did not see why not since that was the policy that Respondent had in all its other plants.

Those September meetings occurred after Annette Strickland was denied her request for immediate vacation time due to an emergency and fired in May 1991. I do not find it remarkable that employees would believe from that time forward that Respondent would not grant same day requests for emergency vacation time. Because of that incident I do not believe that the employees' questions and responses when Scott Varner told them they should receive immediate

[2] Johnson was employed by Respondent as a foreman until his discharge in May 1990. Johnson testified without rebuttal that he talked with Plant Manager McDonald about requests for immediate vacation time because that question came up in 1989 regarding the eight hour holiday pay policy. I specifically credited Johnson's testimony in the underlying decision.

vacation time in emergencies, shows that Respondent's policy and practice during and before May 1991 was to deny requests for emergency vacation time.

Respondent argued in its remand brief that there was no evidence showing that employees were aware of Strickland's discharge after she was denied emergency same day vacation time. In fact Respondent went through two union organizing campaign's in 1990 and 1991. On April 25, 1991, Strickland testified in an unfair labor practice hearing that involved matters during the 1990 campaign. On May 6 or 7, 1991, Foreman Luke Moody told Strickland's new foreman that Strickland was trouble and that he should get rid of her. A day or two later, Strickland was denied emergency vacation time and fired. It is unrealistic to believe that employees in the plant did not know something of what was going on especially after the NLRB Regional Office issued a complaint alleging that Strickland was discharged in violation of the law, on June 28, 1991.

Moreover, Director of Human Resources Fincher Allen admitted on cross-examination that he was present in meetings conducted by Scott Varner in the previous union campaign during the fall of 1990. When asked about discussions during those meetings Allen testified first that he didn't remember the absentee policy being as big an issue then, and finally he testified that the absentee policy may have come up.

Allen's testimony tends to undercut Respondent's argument as to the import of the employees questions in September 1991 regarding the absentee policy. Allen obviously did not recall whether that issue came up during the fall of 1990. Apparently it did not come up then if Scott Varner's testimony is credible because Varner testified that he was surprised when the employees questioned the policy regarding immediate emergency vacations during September 1991 meetings, because the policy in all the other plants was to grant emergency vacation and he thought that was the policy in Hattiesburg until corrected after his first day's meetings. If the employees had questioned Varner on that issue in 1990, it stands to reason that he would not have been surprised by their renewing that concern in 1991.

In view of the employees not questioning that policy in 1990, one must wonder why it was such a hot topic one year later when, according to Varner, the employees brought up that subject in almost every one of the meetings. Allen estimated there may have been 50 employee meetings in a 6-week period in the fall of 1991.

Obviously something occurred between the employee meetings in the fall of 1990 and a year later. I have found herein that Jim Sanders, by his own testimony, did not change the policy as alleged by Respondent, in January 1991. Therefore, the most likely candidate for such an occurrence is the discharge of Annette Strickland after Jim Sanders refused her request for emergency vacation. That occurrence would explain why, according to Vice President Varner, the employees repeatedly brought up the question of could they receive immediate emergency vacation time.

I am also aware that much of Respondent's argument is based on evidence regarding same day requests for vacation time and that issue may differ from same day requests for vacation time under *emergency* conditions. In that respect it is clear that Strickland's belief that her car had been stolen along with the difficulty she encountered that day in retrieving her car after she discovered it had been repossessed rather than stolen, would qualify as an emergency at least to the extent Sanders learned before granting other requests including his granting Myrtle Temple permission to take vacation time to accompany her daughter to the funeral of a friend and the emergencies he recognized in granting Annette Fairley's requests. Fairley requested immediate vacation time following her auto accident and additionally after she returned to work.

Jim Sanders' conference with employee memo dated July 3, 1991, shows that after Fairley returned to work after being granted immediate emergency vacation following her accident, she again asked Sanders for vacation time off because too many people were asking questions about her accident and she could not handle it. Sanders denied her vacation time because she had already started work that day but he granted her time off ''without charge,'' and Sanders reminded Fairley that was the second or third time in 3 weeks that he had let her go home. That memo written by Sanders shows that rather than one exception to his alleged no immediate vacation policy, he effectively granted at least 3 days of immediate vacation to Fairley. Sanders granted Fairley's request for a day's vacation on the day following her accident. He let Fairley go home without charge the next day and, according to his memo that was the second or third time in 3 weeks that he let Fairley go home. Additionally, as mentioned in the underlying decision, Sanders memo was self-serving. He wrote the memo 5 days after the complaint issued alleging Strickland was illegally discharged.

Respondent also takes issue with testimony by former foreman, Billy Johnson, and Johnson's prehearing affidavit as to immediate vacations allegedly granted by Johnson in 1989. I find there is no substantial conflict between Johnson's affidavit where he mentions one occasion of granting immediate vacation to Myrtle Temple as opposed to his testimony as to more occasions of granting Temple immediate vacation.

I specifically credited the testimony of Johnson in the underlying decision. I continue to credit his testimony. Johnson's testimony illustrates an additional conflict with the testimony of Jim Sanders as well as that of Tom Thorla. Both Sanders and Thorla testified that Respondent's policy of no immediate vacation time, was in place in 1989. As shown above, I discredit testimony that Respondent had such a policy especially as to emergency situations, when it discharged Annette Strickland. Additionally, in the underlying decision I specifically credited the testimony of Johnson that on one occasion he told Jim Sanders that he had granted immediate vacation time to Myrtle Temple and Sanders replied that was fine, no problem.

In view of the full record and especially the matters noted above, I find that the record supports a finding that General Counsel proved prima facie, that Respondent was motivated by Strickland's protected activities in discharging her on May 8, 1991.

I find, in view of the above, that Respondent's asserted grounds for its discharge of Annette Strickland were pretextuous and Respondent failed to prove that it would have discharged Strickland in the absence of her protected activities. See *Northport Health Services v. NLRB*, 961 F.2d 1547 (11th Cir. 1992).

In reaching the above findings and determinations, I do not rely of any evidence regarding Respondent's actions fol-

lowing requests for immediate vacation, at any time after Scott Varner told employee that Respondent could grant immediate vacations in September 1991. I find that credited evidence failed to prove that Jim Sanders followed a different practice than other departments at Respondent's Hattiesburg facility and evidence which I have credited established that it was Respondent's and Jim Sanders' practice in May 1991 to grant same day requests for emergency vacation.

Additionally, the Board held that I must make a determination of whether the relevant examples of disparity constitute substantial evidence and not isolated events. The evidence shows that employees were routinely granted emergency vacations on the day the requests were made. I base that finding on the record which shows that in every case shown in the record (excepting of course the May 8 request of Annette Strickland), the employees' requests were granted and on the unrebutted evidence that the Plant Manager told former Foreman Billy Johnson that it was Respondent's policy to reward its good employees by granting their requests for immediate vacation time. I have specifically discredited evidence showing that Respondent's policy was other than what was told to Billy Johnson by Plant Manager Malcolm McDonald. Therefore, my findings are not based on isolated events but on showing that it was Respondent's policy to grant emergency same day requests for time off and that Respondent consistently followed that policy with the exception of the case of Annette Strickland. I find that Strickland was shown to have been denied her May 8 request for emergency vacation time even though she was eligible for vacation time, because of her protected activity of testifying against Respondent in an NLRB hearing and that Respondent failed to prove that Strickland would have been denied her request in the absence of her protected activities.

Respondent also argued that to the extent there was disparity shown in the record, the employees that received more favorable treatment were either union supporters or people that testified in the prior unfair labor practice hearing. As to that issue Respondent recognized itself that there was no evidence showing other disciplinary action for its refusal to grant immediate vacation time because there could be no discipline absent the employee being at or beyond 10 absentee occurrences. That covers the difference between Annette Strickland and other employees including Myrtle Temple and Annette Fairley. Strickland was in a position of peril. She was the only one shown to qualify under the policy enunciated by Plant Manager McDonald, i.e., ''we would take care of the good employees, and people who were becoming in peril with their absenteeism would be put on vacation days when they called in.''

Annette Strickland testified on April 25, 1991, that Supervisor Jim Sanders had refused to discipline her former foreman, Luke Moody, after she told Sanders that Moody granted her time she did not work in the hope that she would grant Moody sexual favors. Employee Sharon Holloway also testified along the line of Strickland's testimony. Other employees including Annette Fairley and Myrtle Temple testified in those proceedings as shown in *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993). However, Strickland was the only one shown to have specifically attacked actions of Supervisor Jim Sanders at a time when she was in peril of discharge. Thirteen days after her testimony Sanders was presented with an opportunity to take advantage of Strickland being ''in peril.''

CONCLUSIONS OF LAW

1. Marshall Durbin Poultry Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by threatening its employees with discharge because they testified in an NLRB hearing; by threatening its employees that it is futile for them to select the Union as their bargaining representative; by threatening its employees with plant closure if they select the Union; and by interrogating its employees about their union activities, has engaged in conduct violative of Section 8(a)(1) of the Act.

4. Respondent by discharging and refusing to rehire its employee Annette Strickland because she gave testimony in an NLRB proceeding, engaged in conduct violative of Section 8(a)(1) and (4) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally discharged its employee in violation of sections of the Act, I shall order Respondent to offer Annette Strickland immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges. I further order Respondent to make Strickland whole for any loss of earnings she suffered as a result of the discrimination against her and that Respondent remove from its records any reference to the unlawful discharge against its employee Annette Strickland and notify Annette Strickland in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Marshall Durbin Poultry Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge because they testified in an NLRB hearing; threatening its employees with

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

futility and that it may close its plant if they select the Union as their bargaining representative; and interrogating its employees about their union activities.

(b) Discharging its employees because of their protected activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Annette Strickland immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make Strickland whole for any loss of earnings plus interest, she suffered by reason of its illegal actions.

(b) Rescind its discharge of Annette Strickland and remove from its files any reference to its discharge of Strickland and notify Annette Strickland in writing that this has been done and that evidence of its unlawful actions will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Hattiesburg, Mississippi, copies of the attached notice.[4] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''